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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 410

GARY DUNCAN,

Appellant,

against

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

BRIEF OF THE STATE OF NEW YORK AS AMICUS CURIAE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL H. RAUCH
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Interest of the Amicus

This case raises the question whether the Sixth Amendment's guarantee of a jury trial in all criminal proceedings applies to the states and, if it does, whether the state courts can only dispense with jury trials in the types of cases which it has heretofore been held that the federal courts may try without a jury.

In New York, the Legislature has authorized the Criminal Court of the City of New York to try and determine

all charges of the grade of misdemeanor or less (except charges of libel). N. Y. City Criminal Court Act § 31. All trials in that court are before one judge without a jury except that in cases of misdemeanors other than gambling offenses a defendant has the right, upon his request, to be tried before three judges. N. Y. City Criminal Court Act § 40. Outside of New York City, misdemeanors are tried by the court without a jury unless the defendant demands a jury trial. N. Y. Code Crim. Proc. § 701. If the defendant exercises his right to demand a jury trial, N. Y. Code of Crim. Proc. § 702, he is entitled to a jury of six rather than a common law jury. N. Y. Code of Crim. Proc. § 710. Since there are thus many situations in which the State of New York does not require a trial by a common law jury for misdemeanors and since any ruling the Court might make in this case could therefore have a substantial impact on the present system of the administration of the criminal law in New York, the Attorney General of the State of New York, the chief legal officer of the State (N. Y. Executive Law § 63), considers it necessary and appropriate to file this brief amicus curiae pursuant to Rule 42 of the Court.

This brief attempts to examine the rationale for and limits of the Sixth Amendment's guarantee of a jury trial and to demonstrate that the provisions of New York law relating to jury trials are within the permissible limits of the Sixth Amendment.

Question Presented

The Court has previously held that the Sixth Amendment's guarantee of jury trials is not binding upon the states, *Maxwell* v. *Dow*, 176 U. S. 581, and if this conclusion is followed there can obviously be no constitutional infirmity in New York's system of dispensing with jury trials in a certain class of cases. However, assuming

arguendo that the jury trial guarantee of the Sixth Amendment is binding upon the states, under what circumstances can the states constitutionally dispense with jury trials in criminal prosecutions?

ARGUMENT

The New York system of dispensing with trial by jury in a certain class of cases fully comports with the Sixth Amendment.

Although the United States Constitution commands that the "Trial of all crimes, except in cases of Impeachment, shall be by Jury", Art. III, § 2, and that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury", Amendment VI, the extent of the applicability of these provisions even in federal trials is not free from doubt. The one constant assumption has been that these provisions do not apply to *all* criminal proceedings and that there is a class of cases for which there is no constitutional right to a trial by jury.

Thus, the history of the common law prior to the adoption of the Constitution reveals a common understanding that many offenses, because of their nature and consequences, were properly tried summarily before a magistrate without a jury. See, *Frankfurter* and *Corcoran*, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury", 39 Harvard L. Rev. 917 (1926). Although there is no apparent unifying principle upon which summary trial was based, *id.* at p. 927, this Court has fashioned two separate standards for determining when a jury trial may be dispensed with. The Court has first looked to the nature of the offense and then to the nature and severity of possible punishment. Applying either of these tests, it is submitted that the New York procedure of dispensing with jury trials in a certain class of cases is consistent with the Constitution.

With respect to the type or nature of the offense, it has generally been held that the federal courts may try "petty", as opposed to "serious", crimes without a jury and this distinction apparently encompasses the traditional distinction between felonies and misdemeanors. *Schick* v. *United States,* 195 U. S. 65. More specifically, the so-called "petty offenses" for which a jury trial is not required seem to be those which were not indictable offenses at common law and are, therefore, not considered to be "crimes" within the meaning of Article III of the Constitution. *District of Columbia* v. *Colts,* 282 U. S. 63. Indeed, the purpose of the constitutional guarantee of trial by jury was to insure that jury trials would be provided in all situations in which the common law required such a procedure but not to extend jury trials beyond their applicability at common law. *Ex Parte Quirin,* 317 U. S. 1.

Similarly, a jury trial is constitutionally guaranteed in New York "in all cases in which it has heretofore been guaranteed", N. Y. Const. Art. I, § 2, and this has been held to mean that trial by jury is not required in misdemeanor cases because there was no common law right to trial by jury in cases of petty offenses tried in inferior courts. *People ex rel. Frank* v. *McCann,* 253 N. Y. 221, 170 N. E. 898. Moreover, all "infamous crimes" (except impeachment, military crimes and petit larceny) must be prosecuted by indictment, N. Y. Const. Art. I, § 4, and only in cases of crimes not prosecuted by indictment is the Legislature authorized to provide that trials may be held by the court without a jury. N. Y. Const. Art. VI, § 18(a). The phrase "infamous crimes" embodies the traditional distinction between felonies and misdemeanors. *People* v. *Bellinger,* 269 N. Y. 265, 199 N. E. 213.

Thus, the general approach in both federal and New York law is to require jury trials only in "serious" rather than "petty" offenses and to distinguish between the two

classes of cases according to whether or not a particular crime was an indictable offense at common law. Testing the "seriousness" of the offense by examining whether it would have been an indictable felony rather than a misdemeanor at common law not only is consistent with the sources of our jurisprudence (see, Plunknett, A Concise History of The Common Law [5th Ed. 1956] p. 438) but also is the only workable objective test relating to the nature of the offense. Resort to more general concepts of "gravity" or "seriousness" in this regard would mean in effect that this Court would be required to classify virtually every crime of less than a felony according to whether or not it was "serious" enough to require a jury trial.

Since New York only dispenses with jury trials in misdemeanor offenses that were not indictable offenses at common law,* the New York practice conforms with the federal standard relating to the nature of the crime charged and is consistent with the Sixth Amendment. Any disposition the Court makes of the case at bar should leave the states free to distinguish between serious and petty offenses according to whether the offense was indictable at common law and to try without a jury those offenses that were not indictable and were therefore tried without a jury at common law.

Even if an offense is "petty" in the sense that it was not indictable or tried by a jury at common law, the Court has also looked to the nature and severity of possible punishment as a test for determining whether or not a jury trial is required by the Constitution. *District of Columbia* v. *Clawans*, 300 U. S. 617. By this test, an offense

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* Even in such cases, a judge of a court which tries indictments can certify that the case should proceed by indictment and in that event the case is removed from the inferior court for presentment to a grand jury. N. Y. City Criminal Court Act § 32; N. Y. Code of Crim. Proc. § 57.

that is "petty" by nature may nonetheless be classified as "serious" because of a comparatively serious sentence. Although no specific length of sentence has been held to be a maximum permissible for an offense to be tried without a jury, the Court has upheld federal convictions in cases involving a six-month sentence. See, *Cheff* v. *Schnackenberg*, 384 U. S. 373.

Congress has provided that "petty" offenses are a class of misdemeanors with a six-month maximum sentence, 18 U.S.C. § 1, but this six-month statutory rule has never been held to be constitutionally mandated. Indeed, it appears to have been a more or less arbitrary line drawn by Congress for describing a class of misdemeanors rather than an attempt to define the maximum constitutional limitation of sentence for offenses tried without a jury. See, *Duke* v. *United States*, 301 U. S. 492. The legislative history of 18 U.S.C. § 1 suggests that this Congress was of the view that offenses punishable by imprisonment of at least up to one year could constitutionally be tried in the federal courts without a jury and settled upon six months in order to fall well within constitutional requirements. See 72 Cong. Rec. 9992 (1930). This view has been recognized by the Court to be consistent with the common law, *District of Columbia* v. *Clawans*, *supra* at p. 626, and there do appear to have been offenses triable without a jury at common law which were punishable by at least one year's imprisonment. *Frankfurter* and *Corcoran*, *supra*, at pp. 932-933. In light of the common law tradition and the legislative history of 18 U.S.C. § 1 it can hardly be said that the six-month standard usually applied in the federal courts is a constitutional standard which should be imposed upon the states in the event that the jury trial provisions of the Sixth Amendment is applicable to state criminal proceedings.

In New York, a misdemeanor (the only type of offense which under New York law may be tried without a common

law jury) is defined as an offense other than a traffic violation for which a sentence of more than fifteen days but not in excess of one year may be imposed. N. Y. Penal Law § 10.00 (4). This limitation is fully consistent with the common law limitations on trials without a jury and should not be replaced by the six-month standard imposed by Congress and the Court pursuant to supervisory powers over federal criminal proceedings.

The reason for dispensing with jury trials in certain cases at common law was essentially "the desire for a swift and convenient remedy" *Frankfurter* and *Corcoran, supra,* at page 927. This reason continues to be applicable today and is beneficial to defendants and the People alike. A wide variety of offenses carrying relatively minor penalties must be tried and disposed of quickly in order to protect an innocent defendant from having a criminal charge pending against him for a period of time longer than that for which he could be imprisoned if he were found guilty. This is particularly necessary for a defendant who is held on bail and could be severely prejudiced by having to wait many months for his case to take its place on an already congested jury trial calendar. The necessity for providing speedy disposition of minor offenses is equally apparent from the State's point of view. The volume of cases handled by the New York City Criminal Court is tremendous* and the strain on the judicial system of convening a common law jury for each minor offense is obvious.

Such considerations were persuasive at common law and remain so today. New York has followed the common law traditions and drawn the line between cases in which a common law jury is required and those in which such a

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* In 1964 there were over three million arraignments and over two million convictions in the New York City Criminal Court; three judge panels tried 11,678 cases to conclusion, resulting in 7,136 convictions. Annual Report of the New York City Criminal Court (1964), Table 1, pp. 12-17.

jury is not required at non-indictable offenses with a maximum imprisonment of one year. This conclusion, we submit, is fully consistent with the Sixth Amendment and should not be replaced by a six-month standard that represents a more or less arbitrary time period with nothing in the common law to support it as a cut-off point. While such a standard is considered by Congress to be appropriate for federal trials, the effort to provide speedy dispositions in the New York City Criminal Court, which handles a volume of cases significantly larger than the federal courts, calls for permitting a somewhat wider range of punishment in non-jury cases. In this light, the New York system of dispensing with common law jury trials in circumstances where that would have been the result at common law is fully in accord with the Sixth Amendment.

CONCLUSION

The Court should render a decision which does not interfere with trial without a jury in the class of criminal prosecutions in which it is permitted in New York.

Dated: New York, New York, December 19, 1967.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL H. RAUCH
Assistant Attorney General
of Counsel